

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Edison Company (U 338-E) for Authority to Lease Communication Facility Sites and Antenna Equipment Locations to Nextel of California, Inc.

Application 02-05-023
(Filed May 7, 2002)

O P I N I O N**1. Summary**

This decision grants Southern California Edison Company (SCE) authority under Pub. Util. Code § 851 to enter into three master agreements and associated standard agreements and three stand-alone agreements that will lease excess space at communication facility sites and antenna equipment locations to Nextel of California, Inc. (Nextel). Nextel will use the space to expand its wireless communications network. In Decision (D.) 00-07-010, the Commission previously granted similar authority to SCE to lease these types of space to Pacific Bell Mobile Services (PacBell).

2. Background and Summary of Request

SCE seeks approval of three master agreements that set forth the framework for leasing communications sites and antenna locations to Nextel. SCE and Nextel also have agreed on standard-form agreements for leasing specific sites and antenna locations. The agreements contemplate that as the parties agree on a site for Nextel's communications equipment, the parties will

execute one of the standard-form leases, depending on the type of site selected, as required by a master agreement.

Prior to executing the master agreements, SCE and Nextel had entered into three stand-alone agreements for licensing or leasing communications facilities sites. The terms and conditions in these agreements are similar to the terms and conditions in the master agreements.

SCE states that the agreements presented in this application are part of SCE's ongoing effort to generate additional revenues from utility assets, while also ensuring that ratepayers receive substantial benefits without risk. Each executed standard-form agreement will generate annual revenues in the amounts set forth in each standard agreement. SCE will treat the revenues billed as other operating revenue, as directed by the Commission in D.99-09-070, with part of the revenues directly benefiting ratepayers.

SCE states that the master agreements and standard-form agreements provide that no lease can take place unless its use by Nextel is compatible with current electric utility operations. SCE states that it will not lease any site that it expects to need for electric utility purposes during the term of the lease. Applicants state that they are sensitive to the Commission's concerns about compliance with environmental regulations, and that Nextel will be required to obtain all land use approvals prior to any construction. The Commission previously endorsed this procedure in D.00-07-010, where it recognized that General Order (GO) 159-A generally delegated authority to regulate the location and design of cellular facilities to local agencies.

As part of this application, SCE seeks approval to convert a number of agreements from licenses to leases. Specifically, SCE seeks to convert the three stand-alone site agreements, 10 agreements executed under the master site

agreement, five agreements executed under the first master attachment agreement, and four agreements executed under the second master attachment agreement. (The license agreements, their site locations, and dates of GO 159-A filings for each lease are set forth in the application.)

SCE also is seeking approval in advance to enter into future lease agreements using the processes described in the agreements. SCE states that advance approval for use of the master agreements and the standard-form agreements to enter into leases with Nextel will avoid the necessity of filing a new application each time SCE and Nextel agree on a specific new communications site or antenna attachment.

3. Outline of the Agreements

The terms and conditions governing the lease of sites are memorialized in three stand-alone site agreements, a master site agreement, and the standard-form site agreements. The terms and conditions governing the lease of antenna equipment locations are set forth in two master agreements and the respective standard-form agreements.

The stand-alone agreements, the master agreement for leasing facility sites and the master agreements for leasing antenna equipment locations contain terms of general applicability, such as pricing and site selection procedures. While the agreements set forth key terms governing the future arrangements between the parties, they do not confer any property interest or possessory interest in any utility property. In general, the agreements contemplate that Nextel will select utility sites that may be suitable for wireless communications equipment. Some sites are underutilized parcels of land, while others are existing SCE communications facilities or SCE-owned buildings. The master

agreements do not give Nextel an option on any site and allow SCE to license or lease sites on a first-come, first-served basis.

Once Nextel selects a site for its network equipment, the master agreements require written notice to SCE with a detailed description of the equipment to be installed, power requirements and site access requirements. SCE then must preliminarily approve or reject a selected site. If SCE approves a site, it will prepare the appropriate standard-form lease for execution. The master agreements require Nextel to reimburse SCE for any expenses incurred in the review process.

SCE and Nextel have entered into 10 standard-form communications site license agreements pursuant to GO 69-C. Nextel has obtained local land use approvals or has determined that such local approvals are not required, and has filed GO 159-A notices with the Commission for each of these sites. When the land use approval process is completed for any future sites subject to a standard site agreement, Nextel is similarly required to comply with GO 159-A. The parties also have entered into nine antenna attachment license agreements. Nextel has obtained local requisite land use approvals or has determined that such approvals are not required, and has filed GO 159-A notices for each of these sites. When land use approval is completed for any future sites that are subject to a standard-form antenna attachment agreements, Nextel similarly is required to file GO 159-A notices.

For a specified term of the master agreements, Nextel will pay an annual rent and use fee as set forth in Exhibit A to the master agreements, depending on the nature of the site on which the attachments or facilities are located. Nextel will have unlimited access to the locations, but it may not use, generate, store or dispose of any hazardous materials at the locations, and it must observe other

restrictions intended to protect SCE's electrical operations. As an additional rent, Nextel will pay SCE the amount of any increase in property taxes levied because of the improvements made by Nextel. At all times, SCE retains the right to use its facilities and any associated property for the provision of utility services.

4. Resolution of ORA Protest

ORA on June 13, 2002, protested the application and questioned SCE's plans for revenue allocation under the proposed lease agreements.

Following discussions, SCE and ORA agreed that facilities site agreements, in which SCE's involvement is limited essentially to providing available property, will be designated as non-tariffed product and service offerings. Under D.99-09-070, these transactions are designated as passive for revenue sharing purposes, and the revenues are to be shared between shareholders and ratepayers on a 70/30 basis.

The attachment agreements, however, will require SCE to design and engineer attachment brackets, construct any required tower modification, install the antennas, and maintain the communication site. Nextel will not be permitted to directly access transmission towers or poles. SCE and ORA agreed that services under the attachment agreements fall within the category of "Use of Communications and Computing Systems," and are categorized as active for revenue sharing purposes. Under D.99-09-070, revenues generated from such active offerings are to be shared between shareholders and ratepayers on a 90/10 basis.

With this agreement on the revenue sharing mechanism, ORA's protest is effectively withdrawn.

5. Discussion

The application is consistent with the Commission's most recent ruling on license-to-lease conversions as set forth in *Pacific Gas and Electric Company for Approval of a Lease for AT&T Wireless Services*, D.02-03-059, dated March 21, 2002. In that case, the Commission noted that it had reservations generally regarding the approval of single agreements that provide for the conversion of a license to a lease, and it cautioned generally that any such agreements drafted in the future¹ would be carefully reviewed by the Commission and might not be approved. Importantly, however, the Commission approved the applicants' license-to-lease conversion for wireless attachments because it was fully consistent with GO 69-C, GO 159-A, and environmental requirements. This application mirrors the transactions in D.02-03-059 and the earlier PacBell ruling in D.00-07-010.

Similarly, we note that the question of "advance" approval of standard-form lease agreements under the master agreements has been explored in SCE's earlier application to lease communication facility sites to AT&T Wireless, Application (A.) 01-11-043. There, the Commission's Office of Ratepayer Advocates (ORA) took issue with the request for "advance" approval of standard-form leases under the master agreements, arguing that each such lease should be subject to prior scrutiny by the Commission's environmental staff.

After investigation, however, ORA withdrew its objection, stating that it had confirmed that GO 159-A, in conjunction with the Commission's holding in

¹ We note that the agreements in this application were drafted well before the Commission's decision in D.02-03-059.

D.00-07-010, addressed ORA's concerns and provided appropriate notice to environmental and ORA staff for the contemplated standard-form leases.²

Pursuant to GO 159-A, the Commission has delegated its authority to regulate the location and design of cellular facilities to local agencies, while retaining oversight jurisdiction in cases of conflict with the Commission's goals or statewide interests. (*See* D.96-05-035.) The agreements require SCE to apply for all required governmental permits and approvals. The Commission concluded in D.00-07-010 that pre-approval of such agreements does not trigger a separate Commission environmental review.

Under D.00-07-010, Nextel is required by Section IV.A of GO 159-A to serve written notice on the Commission as local permits or approvals are granted or as findings are made that no such approval is necessary because of the minor nature of planned construction. Should permits or approvals not be granted, Nextel would be free to file an application with this Commission for preemptive authority under Section VII of GO 159-A.

² In 1990, the Commission adopted GO 159, delegating its authority to regulate the location and design of cellular facilities to local agencies, except in those instances when there is a conflict between the actions of local agencies and the Commission's regulatory goals or statewide interest. In 1996, the Commission adopted more streamlined procedures for wireless carriers to notify the Commission of new facilities by replacing the advice letter procedures under GO 159 with the notification process under GO 159-A. Under GO 159-A, wireless carriers must obtain local government review and approval before beginning any construction. The carrier must also notify the Commission that it has obtained approvals or that no approval is required. The notification letter must include a description of the project and location. A unanimous Commission acknowledged the sufficiency of this environmental review in *Pacific Bell Mobile Services*, D.00-07-010.

In A.01-11-043, ORA concluded, as did the Commission in D.00-07-010, that these processes assure that proper environmental review will occur at the appropriate time upon execution of the standard-form leases. (*See* D.00-07-010, at 8.)

6. Conclusion

We will grant SCE's request for approval of the master agreements and standard leases. The arrangement between SCE and Nextel makes good sense from several perspectives. We have approved similar arrangements in the past, including SCE's lease of space to Pacific Bell Mobile Services in D.00-07-010, the use of underground conduits for fiber-optic installation in D.93-04-019 and D.94-06-017, and the use of above-ground conduits in D.95-05-039. We have also approved a similar arrangement in D.02-03-059.

The master agreements and standard leases make productive use of what is currently available space. It is reasonable for California's energy utilities, with their extensive easements, rights of way, and cable facilities, to cooperate in this manner with telecommunications utilities that seek to build an updated network. Joint use of utility facilities has obvious economic and environmental benefits. The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers.

SCE will treat the revenues associated with the agreements in accordance with D.99-09-070, in which the Commission adopted a gross revenue sharing mechanism for certain of SCE's other operating revenues. With certain exceptions, the gross revenue sharing mechanism provides that revenues above an annual threshold level will be split between shareholders and ratepayers according to allocation rules set forth in D.99-09-070.

The agreements provide other important benefits. To the extent that Nextel is permitted to use SCE's existing land, communications facilities and buildings, residents of areas to be served by the Nextel network will be spared the disruption of Nextel installing its own installations on other properties.

Moreover, Nextel will be able to develop its network more quickly, with a corresponding benefit to telecommunications consumers.

As we have done in D.00-07-010 and D.96-10-071, we shall impose notification provisions upon SCE regarding substantive changes in the leases or plant in service, changes in rights of way affected by the standard leases, and SCE's use of Nextel facilities placed on leased sites. We also will require SCE to notify our Energy Division of the execution of each standard-form lease, along with a description of the site selected.

7. Uncontested Matter

In Resolution ALJ 176-3088, dated May 16, 2002, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. Based on the record, we conclude that a public hearing is not necessary, nor is it necessary to alter the preliminary determinations in Resolution ALJ 176-3077.

With the withdrawal of ORA's protest, this is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Findings of Fact

1. Nextel will pay an annual rent and use fee for the use of SCE space and antenna facilities.
2. Revenue from these leased facilities will be booked as other operating revenues, with proportionate sharing between shareholders and ratepayers pursuant to D.99-09-070.
3. The proposed agreements provide that no lease can take place until SCE determines that the lease is compatible with electric utility operations.

4. Under the agreements, Nextel will be required to apply for local use permits and to comply with applicable environmental requirements.

Conclusions of Law

1. Joint use of utility facilities should be encouraged in appropriate cases because of the obvious economic and environmental benefits.

2. The master agreements proposed by SCE, setting forth the framework for leasing an unspecified number of sites and facilities to Nextel for its wireless network, should be approved.

3. The environmental review of subsequent individual leases entered into under the master agreements is governed by GO 159-A, wherein the Commission has delegated its authority to regulate the location and design of cellular facilities to local agencies while retaining oversight jurisdiction in cases of conflict with statewide interests.

4. Because there are no outstanding issues remaining before the Commission in A.02-05-023, the docket should be closed.

O R D E R

IT IS ORDERED that:

1. The application of Southern California Edison Company (SCE) for authority to lease communication facility sites and antenna equipment locations to Nextel of California, Inc. (Nextel), as that transaction is more fully described in the application and its exhibits, is approved.

2. SCE shall notify the Office of Ratepayer Advocates (ORA) and the Energy Division, in writing, of all substantive amendments to, extensions of, or terminations of the agreements with Nextel described in this application.

3. SCE shall notify ORA and the Energy Division, in writing, of any substantive changes to plant in service resulting from implementation of the agreements described in the application, within 60 days of any such change.

4. SCE shall notify ORA and the Energy Division if any right of way that is the subject of the agreements ceases to be used and useful for the provision of electric service, or if there are any substantive changes in the right-of-way segments which are the subject of the agreements described in the application, within 30 days of any such event.

5. SCE and Nextel shall comply with the notice requirements of General Order (GO) 159-A as to all agreements entered into pursuant to the authority granted herein.

6. The sharing of revenue between shareholders and ratepayers of SCE derived from the telecommunications leases entered into pursuant to the authority granted herein shall apply in accordance with the allocation rules adopted in Decision 99-09-070.

7. Nextel shall promptly serve a notification letter on the Commission, as required by Section IV.A of GO 159-A, as to whether the permits and approvals for an individual lease entered into under the agreements authorized herein have been granted by local authorities, or if no permits or approvals are necessary.

8. SCE shall promptly notify the Energy Division, in writing, of the execution of each standard lease, along with a description of the site selected.

9. Application 02-05-023 is closed.

This order is effective today.

Dated _____, at San Francisco, California.